for The Defense

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The Training Newsletter for the Maricopa County Public Defender's Office ⋈ Dean Trebesch, Maricopa County Public Defender

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Defining Reasonable Doubt: Is *Winship* Sinking?

by James R. Rummage
Deputy Public Defender--Appeals Division

The constitutional right to due process requires that no criminal defendant may be convicted except upon proof beyond a reasonable doubt of every element of the crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970). That requirement seems clear enough, but the efforts to limit the state's burden of proof beyond a reasonable doubt are coming in ever larger waves which threaten to swamp *Winship*, and perhaps to submerge it entirely. Those efforts include attempts to define the term, making conviction more likely.

In *United States v. Adkins*, 937 F.2d 947, 950 (4th Cir. 1991), the court states, "This circuit has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof." The definition of reasonable doubt set forth in *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995), which must be given to Arizona juries after January 1, 1996, is a superb example of what the Fourth Circuit meant. In spite of its impressive pedigree--it is a variation on one of the Federal Judicial Center's PATTERN CRIMINAL INSTRUCTIONS--the instruction mandated by the Arizona Supreme Court in *Portillo* significantly lowers the state's burden of proof. The most serious problems lie in the second paragraph, which reads:

> Proof beyond a reasonable doubt is proof that leaves you *firmly convinced* of the defendant's guilt. There are very few things in this world which we know with *absolute certainty*, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are *firmly convinced* that the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think there is a *real possibility that he/she is not guilty*, you must give him/her the benefit of the doubt and find him/her not guilty.

182 Ariz. at 596 [emphasis added]. Although other language in the instruction may also present problems, the emphasized language appears to be the most objectionable.

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First of all, there can be no question that defining proof beyond a reasonable doubt in terms of being "firmly convinced" impermissibly lowers the state's burden of proof. The words of the Arizona Supreme Court itself demonstrate this:

> We believe that "certainty" is truer to the concept of truth beyond a reasonable doubt than to the "highly probable" meaning of the clear and convincing standard. Likewise, a "firm belief or conviction" is truer to the clear and convincing standard than a definition equating clear and convincing evidence with "certain, plain . . . unambiguous" evidence.

State v. King, 158 Ariz. 419, 423, 763 P.2d 239 (1988) [emphasis added]. While, admittedly, the Arizona Supreme Court was explaining the "clear and convincing" standard in *King*, the court stated what is obvious to all: that a "firm conviction" applies to the clear and convincing standard, not to "proof beyond a reasonable doubt."

Several United States Supreme Court cases dealing with the "clear and convincing evidence" standard have quoted, with apparent approval, definitions of "clear and convincing evidence" which equate it with a "firm belief or conviction." *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 516, 110 S.Ct. 2972, 2981, 111 L.Ed.2d 405 (1990); *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 285, n. 11, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990); *Miller v. Florida*, 482 U.S. 423, 426, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). The Supreme Court stated in *Ohio v. Akron Center for Reproductive Health*:

> We find the clear and convincing standard used in H.B. 319 acceptable. The Ohio Supreme Court has stated:
>
> "Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal."

497 U.S. at 516, 110 S.Ct. at 2981-82 [emphasis added, citation omitted]. While the Supreme Court was not considering a challenge to a jury instruction in *Ohio v. Akron Center for Reproductive Health*, the Court was making a determination as to whether the clear and convincing evidence standard, as defined by the Ohio Supreme Court, was an appropriate standard to apply to the matter at issue in that case. Had the Ohio Supreme Court's definition of clear and convincing evidence been incorrect, the United States Supreme Court would certainly not have quoted it without correcting the error.[1]

It should be noted that in *State v. Jones*, 182 Ariz. 243, 895 P.2d 1006 (1994), the Court of Appeals considered an argument that it was error to use the term "firmly convinced" to define proof beyond a reasonable doubt. The Court of Appeals found that *State v. King, supra*, was not controlling, and ignored *Ohio v. Akron Center for Reproductive Health*, *Cruzan* and *Miller*, *supra*. The Court of Appeals conceded in *Jones* that "firm conviction" and "firmly convinced" could be considered the same, but the court found, in essence, that this chameleon-like term could be used to describe both "clear and convincing evidence" and "proof beyond a reasonable doubt." 182 Ariz. at 246. The Arizona Supreme Court denied the petition for review in *Jones* a month before deciding *Portillo*. The *Portillo* opinion never addresses the problem discussed in *Jones*.

In *Portillo*, the Arizona Supreme Court cites the concurring opinion of Justice Ginsburg in *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239 (1994), as support for the instruction the Arizona court now mandates. Justice Ginsburg recommends the Federal Judicial Center's pattern instruction, from which the *Portillo* instruction is drawn. 114 S.Ct. at 1253. It is important

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Editor: Russ Born

Assistant Editors: Georgia Bohm
Sherry Pape
Jim Haas

Office: 11 West Jefferson, Suite 5
Phoenix, Arizona 85003
(602) 506-8200

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to note that no other justice joined in Justice Ginsburg's concurrence, and that no other justice recommended the instruction she touts. It is doubtful Justice Ginsburg was able to keep the Federal Judicial Center's pattern instruction a secret from the other justices. What then can explain the other justices' failure to adopt an instruction which supposedly "surpasses others" in defining reasonable doubt? Perhaps it is because the Federal Judicial Center's instruction is not the commendable definition some proclaim it to be. Perhaps it is because the other justices see the conflict between the pattern instruction and the definitions of "clear and convincing evidence" approved in *Ohio v. Akron Center for Reproductive Health*, *Cruzan* and *Miller*, *supra*. In any event, Justice Ginsburg's concurrence in *Victor* cannot be read as United States Supreme Court approval of the instruction she recommends.

--the instruction mandated by the Arizona Supreme Court in *Portillo* significantly lowers the state's burden of proof.

In *In re Winship*, the United States Supreme Court stated:

> It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

397 U.S. at 364, 90 S.Ct. at 1073 [emphasis added].[2] This is echoed in the statement of the Arizona Supreme Court in *King*, *supra*, that, "We believe that 'certainty' is truer to the concept of truth beyond a reasonable doubt than to the 'highly probable' meaning of the clear and convincing standard." 158 Ariz. at 423 [emphasis added]. By contrast, the instruction mandated by *Portillo* states, "There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt." 182 Ariz. at 596. Although the language of the instruction does not directly contradict the words of *Winship*, it does suggest a concept contrary to that expressed in *Winship*. What is the difference between "absolute certainty" and "utmost certainty?" If the jurors are to be told that they need not be convinced of the defendant's guilt with "absolute certainty" before they convict, should they not also be told that before they can convict, they must be convinced of the defendant's guilt with "utmost certainty," as stated in *Winship*? At the very least, telling the jurors that they need not be convinced with absolute certainty, without telling them more, undermines the concept of proof beyond a reasonable doubt.

The language in the instruction which suggests that, "[I]n criminal cases the law does not require proof that overcomes every doubt," is likewise a misleading statement because of what it leaves unsaid. Quite simply, if the instruction addresses the point at all, it should say, "The law does not require proof that overcomes unreasonable doubts. It only requires proof that overcomes every reasonable doubt." By only telling the jury, "the law does not require proof that overcomes every doubt," the instruction suggests to the jurors that as long as the state has overcome most of their doubts, the state has made its case. This is plainly not the law.

Finally, the last sentence of the *Portillo* instruction shifts the burden of proof to the defendant, stating, "If, on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty." These are the last words which are left ringing in the ears of the jurors on the topic of the burden of proof. This sentence tells the jurors that in order to acquit, they must affirmatively find there is a real possibility that the defendant is not guilty. Of course, that turns the burden of proof around. The jury's sole duty is to find whether the state has proved the defendant's guilt beyond a reasonable doubt. The instruction instead tells them that they must affirmatively find a real possibility that the defendant is not guilty in order to acquit. "[I]t is not a defendant's responsibility to introduce reasonable doubt as to an element of a crime. Rather, it is the state's responsibility to prove the element beyond a reasonable doubt." *State v. Mincey*, 130 Ariz. 389, 398, 636 P.2d 637, 646 (1981). The *Portillo* instruction impermissibly shifts the burden of proof to the defendant.

The new Revised Arizona Jury Instructions (Criminal) (Revised 1996), attempt to correct the *Portillo* burden-shifting problem by adding as a closing paragraph:

> You must decide whether or not the State has proven the defendant guilty beyond a reasonable doubt. You must start with the presumption that the defendant is innocent. The State must then prove the defendant guilty beyond a reasonable doubt. This means that the state must prove each element of the charge(s) beyond a reasonable doubt. If you conclude that the state has not met its burden of proof beyond a reasonable

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doubt, then you must find the defendant not guilty of [that] [those] charge(s).

This additional paragraph might negate the burden-shifting problem, but it does not address the other problems in the *Portillo* instruction. Of course, if we are free to make additions to the *Portillo* instruction, all sorts of possibilities are opened up. It is unknown whether the paragraph added to the *Portillo* instruction in the RAJI will be accepted by Arizona courts, since the Arizona Supreme Court no longer gives qualified approval to any proposed instructions. The "R" in RAJI now stands for "Revised" instead of "Recommended."

Although the *Portillo* instruction has been mandated by the Arizona Supreme Court, it was mandated without being truly litigated in that case. The issues presented here were not actually resolved in the *Portillo* decision. In light of the failure of the United States Supreme Court to adopt the pattern instruction in *Victor*, in light of the United States Supreme Court cases which approve definitions of "clear and convincing evidence" equating that burden with a "firm belief or conviction," in light of the conflict between "utmost certainty" in *Winship* and "absolute certainty" in the *Portillo* instruction, and in light of the fact that the *Portillo* instruction shifts the burden of proof, it is appropriate to object to the giving of that instruction. The *Portillo* instruction violates our clients' rights to due process. It must be understood that an objection to this instruction is unlikely to bear fruit at trial, or even on direct appeal in state court. These issues should nevertheless be brought to the attention of the courts in the hope that somewhere down the line, reasonable doubt will once again mean reasonable doubt, and not clear and convincing evidence. If *Winship* sinks, many of our clients are likely to go under with it.

1. The definition of clear and convincing evidence contained in Black's Law Dictionary, 227 (5th ed. 1979), is almost exactly the same as the definition quoted in *Ohio v. Akron Center for Reproductive Health*. There are also a great many cases from many jurisdictions which define "clear and convincing evidence" in terms of "firm belief or conviction." Space does not permit listing them here, but the author will be happy to supply a sample listing to anyone interested.

2. Thanks to Deputy Public Defender Anna Unterberger, who, during a 1992 trial, requested an instruction which defined reasonable doubt as being convinced with "utmost certainty." As in the *Jones* case, the petition for review in the appeal from Anna's trial was denied by the Arizona Supreme Court a month before *Portillo* was decided. Of course, *Portillo* makes no mention of *Winship*'s "utmost certainty" language.

Ω

A Time To Chill: Appeals Court Affirms Confidentiality Ethical Rule

by Christopher Johns
Deputy Public Defender--Appeals Division

"I hate to do this to my lawyer," he muttered quietly.

"Don't be stupid, man," Cat scolded. "You better be lookin' out for Carl Lee and to hell with this child. This ain't no time to worry 'bout hurtin' feelin's. He's a lawyer, forget him. He'll get over it."

----John Grisham,
A Time to Kill

A time to keep silence, and a time to speak.

----*Ecclesiastes 3:7*

The ethical rules shouldn't be marginalized for publicly "appointed" counsel even if our clients are constantly marginalized.

When the "new training" director asks you for an article for the newsletter, you sympathize. Been there. Done that.

When he asks you to write about your own special action win, it's more awkward than delicious. Wrote that and now the state has petitioned for review, most likely at the urgent suggestion of the bench askance at their ivory tower brothers' and sisters' reasoned decision. In other words, victory with a small "v" may still be converted into another snide slap at those who dare to defend the guilty, despised, and miscellaneous other throw-away people.

Maricopa County Public Defender's Office, Attorneys Christopher Johns and Diane Enos v. Superior Court, filed July 11, 1996, is about an old, but ongoing legal, ethical, and political controversy to some. But to lawyers who have chosen to be public defenders, it is about the simple re-affirmation that "we" are lawyers like everyone else--even if we didn't end up at some tony law firm or serving some other genteel hierarchy.

Bottom line: there are limited circumstances under which lawyers can reveal their clients' confidential communications--and the judge's whim to "prove" a conflict of interest isn't one of them. The ethical rules shouldn't be marginalized for publicly "appointed" counsel even if our clients are constantly marginalized.

E.R.1.16 is applicable to public defenders and judges.

The lawsuit resulted from a special action, which according to the Court of Appeals is "the proper subject of a petition for special action." The facts were simple. Our client was arrested with his girlfriend. She was pending sentencing unknown to our new client's lawyer.

The by-now-former client was interviewed regarding the new crime. In the police report she made inculpatory statements, as well as statements damaging to

the new client.

A motion to withdraw was filed. The trial court scheduled an *in camera* hearing to determine for itself whether information was damaging. Diane and I refused to divulge it on the basis of the Rules of Professional Responsibility. We requested that the trial court order us to divulge the information. The trial court refused to do that, but did deny the motion.

A special action followed. We also asked for other attorneys with similar issues to join us. Chelli Wallace did so. The Court of Appeals accepted jurisdiction, granted our requested relief (withdrawal), and provided a written opinion.

We framed the issue as to whether E.R. 1.16 provides any exception that would allow an attorney to communicate confidential information. Sometimes forgotten is that confidential information is distinct from the lawyer-client privilege and the rigamoroll about "whether it's public record."

Whether information is public or not has nothing to do with confidential communications. If your client tells you Bill Clinton is president, it's still a confidential communication that cannot be divulged absent an exception in the rules of professional conduct.

The AG's Office, of course, purported to have the authority to represent the trial court (this was uncontested by our action). Their position was that the entire issue revolved around "who" determines the conflict. Their parade of horribles was that public defenders will willy-nilly dump cases if they [the public defenders] make the decision about whether a conflict of interest exists.

As part of the record, our special action incorporated the Office's policy on conflicts, as well as referenced law review articles that generally supported our position. We also tried to explain how and why the policy is not only consistent with the ethical rules, but with the best interests of the present and former clients (no easy task--at one point the court's opinion seems perplexed about the importance of actually reviewing a former client's file to determine whether adverse confidential information exists).

But the opinion grasps the important concept that screening in a large public defender office is impractical. Moreover, as our special action argued, public defenders are also officers of the court and are in the *best position professionally and ethically to determine whether a conflict of interest exists or will probably develop in the course of the trial. . . . The trial court should give great weight to the representation by counsel that there is a conflict, particularly in the case where the counsel has been appointed by the court rather than retained by the defendants.* [citing *State v. Davis*, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973)].

Practitioners should remain aware that a petition for review has been filed by the AG's Office on behalf of the trial court. Ω

Air Quality from a Different Angle
("If I Have My Way, My Car's Gonna Break at Least Twice A Week")

by Amy Bagdol, Administrative Coordinator

If there's Christmas in July, then New Year's must be in August. Let's talk RESOLUTIONS. "I will save more money this year. I will be more active. I will stop smoking (or at least cut down). I will be on time every morning and go home at 5 every night. I will relax more, feel better." Where did I go wrong? I went over my impossible budget, bought a gym membership I don't have time to use, got some nicotine patches I don't wear, and lost a lot of sleep. I guess I don't take failure well.

Then something wonderful happened. My car broke down. (The largest car Detroit ever built gets 4 mpg--uh huh, my car.) I panicked, forced toward the obvious. I assigned myself a bus pass and called Phoenix Transit (253-5000). After all, it was free. I borrowed my daughter's one-speed and biked to the express bus stop a mile from my South Tempe home. I didn't feel much like a smoke after the bike ride. I started reading a book I've been trying to get to for a month. I got to work early and left work on time.

Knowing the air quality in Phoenix, what I did felt good, and that night I slept like my cat. ("Honey, is he breathing?")

Someone once told me: "KISS" [Keep It Simple, Stupid]. I realized that I had come closer to keeping my resolutions in one day than I had in the first six months of the real New Year.

Did you know that the County provides taxi vouchers to guarantee your ride home in case of an emergency? That there are Madison Garage spaces for carpoolers and bus riders? That through September, the bus pass deposit ($25.50) is waived, and that the fare is FREE? Buses go to jails and justice courts? Buses have bike racks? There are shower facilities in the Luhrs Building? That the HOV lane is really fast (and fun if someone else does the merging)?

You don't have to wait for your car to break down to try it. Come see me about a bus pass. Start slow, one or two days a week. It's easy. I'll help you figure it out. 506-3061. Ω

Arizona Advance Reports
A summary of criminal defense issues in Volumes 216, 218 - 221

by Max Bessler, Office of the Legal Defender

Death Penalty: Aggravating/Mitigating Factors

State v. Jackson, 216 Ariz. Adv. Rep. 9 (1996)

In this death sentence review, the Arizona Supreme Court upheld imposing the death penalty for a 16-year-old. In a special concurrence, Chief Justice Feldman noted his reluctance to impose the death penalty on 16-year-olds, but the crime in this matter was so senseless that not to impose the death penalty because of the defendant's age "is to say we will never impose the death penalty on a sixteen-year-old defendant."

State v. Gallegos, 216 Ariz. Adv. Rep. 16 (1996)

In reviewing the defendant's death sentence, the Arizona Supreme Court noted that although the defendant proved a history of substance abuse, this mitigating factor was reduced by his failure to act to resolve the problem or to benefit or seek treatment during his period of probation.

State v. Mata, 216 Ariz. Adv. Rep. 48, (1996)

The Arizona Supreme Court held that cases in which the trial court sentenced the defendant to death based upon a finding of "especially heinous, cruel, or depraved" prior to the opinion in *State v. Gretzler*, 135 Ariz. 42 (1983) do not need to be resentenced.

State v. Miller, 220 Ariz. Adv. Rep. 63 (1996)

In its review of the defendant's death sentence, the Arizona Supreme Court held that the defendant's "intoxication did not impair his ability to conform his conduct to the law or his appreciation of the wrongfulness of his conduct. As we said in *State v. Kiles* [175 Ariz. 358 (1993)], '[w]e refuse to equate defendant's *unwillingness* to control his actions with an *inability* to do so.'" The Arizona Supreme Court went on to address the co-defendant's plea and sentence to life imprisonment. A difference in sentences between co-defendants through appropriate plea bargaining is not mitigating. *State v. Stokley*, 182 Ariz. 505 (1995).

DNA Testing

State v. Johnson, 221 Ariz. Adv. Rep. 13 (1996)

The defendant was convicted of sexual assault and sentenced to an aggravated term of 14 years. Among other issues, he challenged the trial court's admission of expert testimony about the probability of a random match between the defendant's DNA and DNA extracted from the victim's clothing. Unlike *Bible*, the testimony in this matter relied upon the modified ceiling method recommended by the NRC rather than the Cellmark's method. The court of appeals upheld the conviction. The defendant appealed.

The Arizona Supreme Court granted review in order to address issues left open in *State v. Bible*, 175 Ariz. 549 (1993). First, the Arizona Supreme Court retained *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) as the standard for admitting new scientific evidence rather than *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1992). Secondly, the Arizona Supreme Court confirmed the court of appeals' decision.

> Based on our review of the NRC (National Research Center) reports, legal commentary, scientific literature, and consideration and acceptance of the modified ceiling method by other jurisdictions, we conclude that the method is generally accepted in the relevant scientific community and that DNA probability calculations computed with that method are admissible under Frye. Our holding extends only to the issue presented in this case--the modified ceiling method. Notwithstanding the 1996 NRC report's conclusions, we do not at this time address the admissibility of probability statistics calculated with the "pure" product rule.

Judicial Issues

State v. Frederickson, 219 Ariz. Adv. Rep. 33

The court of appeals concurred with the defendant that he was entitled to a jury trial in city court for the offense of leaving the scene of an accident because it involved "moral turpitude." Under Arizona law a crime is a jury-eligible offense if (1) the defendant is exposed to sever penalty, (2) the act involves moral turpitude, or (3) the crime has traditionally merited a jury trial. *State v. Harrison*, 164 Ariz. 316 (App. 1990).

Maricopa County Public Defender's Office v. Superior Court in Maricopa County, 220 Ariz. Adv. Rep. 83 (1996)

The Public Defender's Office moved to withdraw from two different cases after the assigned deputy public defenders learned that the Office had represented individuals associated with each of the cases. In completing reviews of the files of these individuals, the attorneys discovered confidential information that could impeach their testimonies. The attorneys' motions to withdraw were denied by two different judges who advised that the attorneys' avowals of conflict were not sufficient and they would need to provide additional information so the court could decide if a conflict existed. The Public Defender's Office filed a special action.

The court of appeals, relying upon *Holloway v. Arkansas*, 435 U.S. 475 (1978) and *State v. Davis*, 110 Ariz. 29 (1973), held the trial courts abused their discretion in denying the motions to withdraw. "The trial court should give great weight to a representation by counsel that there is a conflict, particularly in the case where the counsel has been appointed by the court rather than retained by the defendants." *Davis* at 31. The trial court can explore the adequacy of the attorney's representations concerning the conflict " . . . without improperly requiring disclosure of the confidential communications of the client." *Holloway* at 486-487.

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Juvenile

Maricopa County Juvenile Action No. JV-511576, 219 Ariz. Adv. Rep. 6 (1996)

The juvenile appealed his transfer hearing to adult court, arguing that he had received ineffective assistance of counsel. The court of appeals noted that although *Pima County Juvenile Action No. J-47735-I*, 26 Ariz. App. 46 (1976) indicated that the right to counsel may not apply in juvenile proceedings, the United States Supreme Court held otherwise in *Kent v. United States*, 383 U.S. 541 (1966), noting ". . . there is no place in our system of law for reaching a result of such tremendous consequences without ceremony -- without hearing, *without effective assistance of counsel.*" In this matter, the defense counsel did not present a second, more favorable psychological evaluation that had been obtained at the juvenile's expense, did not call the psychologists at the transfer hearing, did not seek a continuance to interview witnesses, and did not return the parents' telephone calls. At the transfer hearing, the defense counsel relied solely upon the court-appointed psychologist and probation officer, and did not cross-examine them. The court of appeals held it was "compelled to agree with the juvenile that, on the facts present here, the attorney's performance was deficient as measured by reasonable professional standards . . . We therefore hold that the juvenile did not receive constitutionally effective assistance of counsel in the transfer hearing, and we reverse and remand for proceedings consistent with this opinion."

Maricopa County Juvenile Action No. JT30243, 220 Ariz. Adv. Rep. 52

The juvenile was walking away from a group of 20 other teenagers when two uniformed police officers arrived and indicated that they needed to see her with all the other juveniles. She returned to the group. When the officers asked if any of the teenagers had cigarettes on them, she acknowledged that she did. She was cited and released. The juvenile filed a motion to suppress which the juvenile court granted finding that the confession had resulted from illegal questioning. The state appealed.

The court of appeals confirmed the dismissal. Using the "reasonable person" test of *United States v. Mendenhall*, 446 U.S. 544 (1980) and *Florida v. Royer*, 460 U.S. 491 (1983), the court of appeals held that the officers detained the juvenile without any reasonable, objective grounds to do so.

Maricopa County Juvenile Action No. JV-132905, 221 Ariz. Adv. Rep. 21 (1996)

After the juvenile entered a plea agreement to pay restitution for damages to a vehicle he stole, he objected to the imposition of restitution noting the vehicle was already damaged when he took it. He appealed the restitution order.

The court of appeals noted this matter differed from *Juvenile Action No. JV-128676*, 177 Ariz. 352 (App. 1994) in which the juvenile was only a passenger in the stolen vehicle. In the present matter, the juvenile admitted the theft and acknowledged responsibility for restitution by signing the plea agreement.

> Because the loss suffered by victim could have been inferred to have been caused by juvenile's admitted criminal conduct, because no credible evidence was submitted by juvenile to refute this inference, and because juvenile agreed to pay restitution for losses relative to his criminal conduct, we affirm the juvenile court's order of restitution.

State v. Superior Court in Maricopa County (JV511263), 221 Ariz. Adv. Rep. 30 (1996)

The juvenile in this matter was adjudicated delinquent for child molestation after attempting anal intercourse with the victim. The victim's mother requested HIV-testing as provided in A.R.S. § 8-241 (N). The juvenile court denied this request finding involuntary HIV-testing to be an unreasonable search under the Fourth Amendment. The state filed a special action.

The court of appeals held

> . . . on the facts presented in this case, we find that the juvenile offender's privacy interest in resisting HIV testing is substantially outweighed by the government's interest in assisting victims of sexual offenses to discover whether they have been exposed to HIV. We further conclude that A.R.S. § 8-241(N) bears an adequately close and substantial relationship to the goal of helping victims to warrant deference from the courts.

The court of appeals went on to hold that the statute was not overly broad and did not violate A.R.S. § 36-665(A). The order finding the statute unconstitutional was vacated and the case remanded for further proceedings consistent with this decision.

Maricopa County Juvenile Action Nos. JV-512600 and JV-512797, 221 Ariz. Adv. Rep. 38 (1996)

In these consolidated matters, both juveniles admitted to counts of child molestation and were ordered to submit to DNA testing as part of their probation conditions. They appealed this condition on a number of issues.

In addressing the first issue, whether A.R.S. §§ 13-4438 and 31-281 could be imposed retroactively pursuant to A.R.S. § 1-244, the court of appeals dismissed the juveniles' argument because they found these statutes not to be punitive in nature and could be imposed retroactively. The court of appeals similarly dismissed the juveniles' second issue, that DNA testing was an unreasonable search and invaded their privacy.

> [T]he expectation of privacy is significantly diminished when one considers that the individual asserting the claim has been adjudicated delinquent for committing a sexual offense. The public's interest in effective law enforcement, crime prevention, and the identification and apprehension of those who commit sex offenses rightfully outweighs the intrusion on the delinquent juvenile's privacy.

The third issue the juveniles raised on appeal involved the use of the DNA results beyond their eighteenth birthday, after the juvenile court lost jurisdiction. The court of appeals held that Arizona's Constitution and the legislature's intent permitted the results to be used after they left the jurisdiction of

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the juvenile court. Lastly, the court of appeals held that DNA testing did not violate the declared mission of the juvenile court: rehabilitation and treatment.

Maricopa County Juvenile Action No. JV-511237, 221 Ariz. Adv. Rep. 42 (1996)

The fourteen-year-old juvenile was granted probation after being adjudicated delinquent for rubbing his five-year-old brother's penis while they watched an x-rated video. As special conditions of probation, the juvenile was ordered to: submit to HIV testing, not possess any sexually stimulating material or patronize any place where such material is available, and wear undergarments and clothing in situations where another person may see him. The juvenile appealed these conditions.

Although the court of appeals confirmed that the juvenile court had a right to impose the HIV testing because the juvenile had admitted to other acts that would have exposed the victim to his bodily fluids, it denied the imposition of this condition because A.R.S. § 8-241(N) specifically allows HIV testing *only on the request of the victim*. The victim did not request such testing in this matter.

The court of appeals next held that the "patronizing" condition was too broad and vague. It precluded the juvenile from visiting convenience markets where *Playboy* might be sold. The court of appeals upheld the condition regarding the juvenile's clothing. It held that this condition merely required the juvenile to be properly clothed in the presence of others. The conditions involving HIV testing and patronizing were vacated.

Cochise County Juvenile Delinquency Action No. JV95000239, 221 Ariz. Adv. Rep. 44 (1996)

The juvenile was adjudicated delinquent and committed on September 1, 1995 for a minimum of two years. The juvenile appealed this order claiming 1) the sentence was *ex post facto* and 2) he should be credited with time he spent in custody.

The court of appeal affirmed the sentence as imposed by the juvenile court. It held the "two year" commitment amendment was in effect at the time the juvenile was committed. Concerning the second issue, the court of appeals noted that in *State v. Ritch*, 160 Ariz. 95 (App. 1989) a previous appellate division held " . . . [j]uveniles who are subsequently committed to a juvenile facility, however, may not be entitled to credit for pre-adjudication custody (unlike those juveniles who are remanded to the adult court)."

Probation Extension

State v. Koruch, 220 Ariz. Adv. Rep. 72

The defendant was granted probation and allowed to move to California. As a condition of probation, he was ordered to pay restitution. Although he paid restitution as ordered, the defendant had an outstanding balance one month before his probation was to expire. The defendant's probation officer obtained a modification extending probation for three years. **Neither the officer nor the state attempted to give the defendant or his attorney notice of the petition request or the order.**

Since the defendant's California probation officer was unaware of this extension, he advised the defendant that his case was terminated and supervision would no longer be required. When the defendant stopped making restitution payments, he was advised by his Maricopa County probation officer of the extension and that he was in violation of his probation. The defendant filed a motion to vacate the modification, contending his due process rights were violated through lack of notice. The trial court denied the motion. The defendant appealed.

While this appeal was pending, the defendant, on advice of counsel, suspended restitution payments believing his obligation was stayed pending the appeal. The state filed a petition to revoke probation. (At the defendant's violation hearing, testimony was offered that it is the common practice of the Maricopa County Probation Department not to give notice of extensions to most out-of-county probationers.) The trial court held that Rule 31.6 provision staying restitution pending appeal applies only to appeals from the original conviction. The defendant was found in violation and reinstated to probation for an additional three years. The defendant appealed.

In both appeals, memorandum decisions were provided. In the first, the court of appeals held that the defendant should have been given notice but that this error was corrected by the violation hearing. In the second decision, the court of appeals affirmed the violation and probation extension.

The defendant appealed. Although all five Arizona Supreme Court Justices agreed to vacate the defendant's extension of probation and the subsequent hearings, they differed four-to-one on the basis of their rulings. The majority proceeded from a constitutional, due process basis. Relying on *Nieuwenhuis v. Kelly*, 795 P.2d 823 (1990) and *Green v. Superior Court*, 132 Ariz. 468 (Ariz. 1982), the four Justices held

> [b]ecause Arizona cases interpreting the Fourteenth Amendment hold that modifications require notice and a hearing, and because an extension is a modification, it follows that an extension requires notice to the probationer that his term will be extended . . . On the facts of the case, we hold defendant was denied federal due process when his probation was extended and modified without notice.

In dissent, but arriving at the same outcome, Justice Martone held that the case should be decided upon state statute and rule rather than constitutional considerations. Relying upon A.R.S. § 13-804(K) and Rule 27.2, Ariz. R. Crim. P., Justice Martone held that this statute and rule required notice to the defendant. "According a probationer notice and an opportunity to be heard before the period of probation is extended to accommodate restitution is a good idea, one which our statute and rule embrace. We even ought to consider extending it to probation periods generally, as has the United States."

Probation Violation

State v. Adler, 218 Ariz. Adv. Rep. 15 (1996)

The defendant was granted probation in 1987. Within a year, he absconded. In July, 1988, the probation officer filed a petition to revoke probation. The defendant was arrested on federal charges in May, 1990. He was sentenced to prison on these charges with a release scheduled for July, 1995. Because the state could not obtain custody of the defendant from the federal system, his violation hearing was not held until January, 1995 by telephone. His probation was revoked and he was sentenced to prison consecutive to the federal sentence. The defendant appealed, arguing the delay in his hearing was unreasonable and prejudicial.

(cont. on pg. 9) ☞

In a 2-1 decision, the court of appeals held that the trial court did not abuse its discretion in allowing the state five years to initiate the violation hearing. The majority held that this case differed from *State v. Flemming*, 184 Ariz. 110, in a number of areas. Judge Grant dissented reasoning the state should have held the defendant's violation hearing *in absentia*.

Restitution

State v. Superior Court in Maricopa County, 220 Ariz. Adv. Rep. 82 (1996)

Severiano Martinez caused a traffic accident in which two people in the other vehicle were injured. Martinez left the scene. He was arrested and charged with leaving the scene of an accident. In city court, he pled guilty to leaving the scene (a criminal offense) and to unsafe turn (a civil traffic offense). One of the victim's insurance company requested restitution. The city court refused to order restitution. The state appealed to the Superior Court in Maricopa County. The superior court upheld the city court's refusal to impose restitution because there was no evidence that Martinez's leaving the scene caused or exacerbated any of the injuries. The state filed a special action.

The court of appeals upheld the city court's decision.

> The plain language of both the constitutional and statutory provisions requires restitution only for losses caused by the criminal conduct for which defendant was convicted. None of the provisions mandate restitution for noncriminal acts committed by defendant. In fact, A.R.S. § 13-809 specifically exempts traffic offenses from those offenses for which restitution is required.

Referring to *State v. Skiles*, 146 Ariz. 153 (App. 1985), the court of appeals noted that none of Martinez's criminal conduct caused the injuries or resulted in any aggravation to the victim's injuries. The court of appeals did correct the city court's ruling that insurance companies were not proper parties for restitution. (*See State v. Blanton*, 173 Ariz. 517 and *State v. Merrill*, 136 Ariz. 300.)

Search and Seizure

Mazen v. Superior Court in Maricopa County, 216 Ariz. Adv. Rep. 97 (1996)

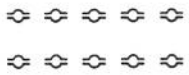
Fire fighters were called to a fire in a commercial storage unit rented by Mazen. They forced open the door to extinguish a fire. When the fire was out, they observed growing marijuana plants and called the police. The investigating detective observed the plants from the outside through the open door. He seized them and subsequently arrested Mazen. When the superior court refused to dismiss the charges based upon a motion to suppress the evidence that was seized in violation of the Fourth Amendment, Mazen filed a special action.

The court of appeals could find no exigent reason the detective did not obtain a search warrant, since they had probable cause to do so. The matter was remanded to the trial court.

Sentencing

State v. Scott, 216 Ariz. Adv. Rep. 100 (1996)

The defendant was convicted by a jury of sale of cocaine. The court decided the amount surpassed the threshold amount, precluding probation. The defendant appealed his prison sentence. The court of appeals held that "the factors influencing the grant or denial of probation have historically been determined by the trial court at sentencing." *State v. Becerra*, 111 Ariz. 541. The finding of threshold amount was appropriately found by the trial court. The conviction and sentence were affirmed. Ω



Inmates: Arizona Prisons

Arizona Department of Corrections reports a total of 22,323 inmates in Arizona's prison system for the yearly quarter ending June 30, 1996.

The breakdown of inmates--

RACE
- Caucasian: 47%
- African-American: 15.5%
- Native American: 3.9%
- Mexican-American: 22.2%
- Mexican national: 10.2%
- Other: 1.2%

EDUCATION
- None: 331
- Some Elementary: 3,861
- Some Secondary: 13,173
- High-Sch. Grad: 3,619
- 2 yrs. of College: 782
- 4 yrs. of College: 63
- Bachelor's degree: 104
- Graduate degree: 21
- Unknown: 369

Source: Associated Press

July, 1996
Jury & Bench Trials--Group A

Dates: Start/Finish	Attorney	Invstgtr.	Judge	Prosecutor	CR# and Charge(s)	Class F/M	Dang.	Priors	On Prbtn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
July 2-12	Dennis Farrell	T. Neus	Hotham	Vercauteren	CR95-10527B 3 cts. Armed Robbery Aggravated Assault	 F2 F3	 ✓ ✓	4		Guilty on all counts. No hearing was held on the priors.	Jury
July 11-16	Tom Timmer	N. Jones	Sargeant	Johnson	CR95-11569 Aggravated Assault Disorderly Conduct	 F3 F6	 ✓ ✓			Guilty on all counts.	Jury
July 15-18	Patricia Ramirez		Dunevant	Hoffmeyer	CR95-07901 Selling Methamphetamine	 F2				Guilty	Jury
July 16-18	Cary Lackey and Jerry Hernandez	C. Yarbrough	Sheldon	Brnovich	CR96-00171 Burglary 3°	 F4		3	Parole	Hung (6 guilty/2 not guilty)	Jury
July 18-24	Rick Tosto and Candace Kent	D. Beever	Sargeant	Altman	CR95-11712 Theft	 F3				Not Guilty	Jury

JULY, 1996
Jury & Bench Trials--Group C

Dates: Start/Finish	Attorney	Invstgtr.	Judge	Prosecutor	CR# and Charge(s)	Class F/M	Dang.	Priors	On Prbtn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
July 2-3	Rob Corbitt	L. Clesceri	Ishikawa	Harrison	CR95-93106 1 ct. Sell Crack Cocaine CR95-92898 1 ct. Poss Crack Cocaine	 F2 F4		3		Guilty on all.	Jury
July 8-11	Gene Barnes	L. Clesceri	Araneta	Hicks	CR96-90110 1 ct. Aggravated Assault	 F3	 ✓	1		Guilty	Jury
July 18-23	Jim Leonard and Wes Peterson	T. Thomas	Armstrong	Manjencich	CR95-92604 4 cts. Child Molest 1 ct. Sex Abuse w/Minor	 F2 F3	 DAC			Guilty-2 cts. child molest Not Guilty-1 ct. child molest Dismissed w/dir. verd.-1 ct. child molest Not Guilty-1 ct. sex abuse	Jury
July 23-29	Todd Coolidge and Slade Lawson	T. Thomas	McDougall	Shutts	CR96-01582 1 ct. Aslt Agst Prsn Guard 1 ct. Prom. Prisn Contrab	 F2 F2	 ✓	3		Guilty on all counts. State dismi ssed 2 priors.	Jury

June, 1996
Jury & Bench Trials--Group B

Dates: Start/Finish	Attorney	Invstgtr.	Judge	Prosecutor	CR# and Charge(s)	Class F/M	Dang.	Priors	On Prbtn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
July 9	Joel Brown	J. Castro	Topf	Rudd	CR95-11561 Aggravated Assault	F2	✓			Hung jury (7-1)	Jury
June 10 - July 11	Rebecca Potter	D. Erb	Lewis	Kelly	CR95-10676(A) Armed Robbery Aggravated Assault	F2 F4	✓ ✓			Hung jury (5-7)	Jury
July 9 - July 12	Tim Agan		Arellano	Lynch	CR96-02964 Aggravated Robbery	F3			✓	Hung jury (6-2)	Jury
July 22 - July 29	Peggy LeMoine	P. Kasieta	Topf	Rudd	CR96-00857 Armed Robbery	F2				Guilty	Jury
July 23 - July 31	Dan Sheperd	J. Castro	Dunevant	Morrison	CR95-11910 Aggravated DUI	F4				Guilty	Jury
July 8 - July 11	Colleen McNally	J. Castro	Dougherty	Inciong	CR95-09289 Aggravated Assault	F3	✓			Not guilty	Jury
July 15 - July 23	Vicki Lopez	D. Ames	Topf	Lynch	CR96-01579 Armed Robbery Theft	F2 F5	✓	2		Not guilty	Jury
July 15 - July 16	* Kamin		Dougherty	Droban	CR96-02693 Trafficking Stolen Property	F3		2	✓	Hung jury (6-2)	Jury
July 29 - July 30	Larry Blieden		McDougall	Droban	CR95-12240 Sale of Narcotic Drugs	F2				Not guilty	Jury
June 10 - June 13	Charles Vogel		Topf	Clark	CR95-11506 Aggravated Assault	F3	✓			Not guilty	Jury
June 10 - June 11	John Movroydis	D. Erb	Hotham	Whitten	CR96-02450 Aggravated Assault	F6				Not guilty	Jury

JULY, 1996
Jury & Bench Trials--Group D

Dates: Start/Finish	Attorney	Invstgtr.	Judge	Prosecutor	CR# and Charge(s)	Class F/M	Dang.	Priors	On Prbtn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
June 24 July 3	Jerald Schreck		Hicks	Ryan	CR-96-02805 1 Ct. Disorderly Conduct	F6	✓			**Not Guilty**	Jury
June 24 July 8	Barbara Spencer	R. Barwick	Rogers	Mroz	CR-96-01892 1 Ct. Aggravated Assault	F3	✓			**Not Guilty**	Jury
June 25 July 2	Robert Reinhardt	S. Bradley	Gerst	Rand	CR-95-08945 1 Ct. Manslaughter W/Vehicle, 1 Ct. Leave Accident W/Death Injury, 2 Cts. Endangerment W/Vehicle	F2 F3 F6	✓ ✓			Guilty on all Counts	Jury
June 28-28	Polly Houle		Rogers (Trial to the Bench)	Mroz	CR-96-03424 1 Ct. Disorderly Conduct, 1 Ct. Misconduct Involving Weapons (Felon in Poss)	F6 F4	✓			Guilty on Misconduct Involving Weapons, **Dismissed Disorderly Conduct**	Bench
July 1-3	Tom Kibler		Rogers	Schlittner	CR-96-02395 2 Cts. Aggravated Assault	F3	✓			**Not Guilty**	Jury
July 8-12	Daphne Budge		Gerst	Wollak	CR-95-10495 1 Ct. Aggravated Assault		✓			**Guilty of Lesser Included** Assault/Class 1 Misdemeanor	Jury
July 8-16	Robert Jung Diane Enos	A. Velasquez	Rogers	Whitten	CR-96-01879 1 Ct. Attpt/Com Murder 1, 1 Ct. Agg Assault	F2 F3	✓ ✓	2 alleged	✓	Guilty	Jury
July 8-10	Polly Houle		Hicks (Pro Tem)	Brnovich	CR-96-09271 1 Ct. Armed Robbery, 1 Ct. Aggravated Assault, 1 Ct. Threat/Intimid	F2 F3 F4	✓ ✓ ✓	2 alleged	✓	Guilty of Armed Robbery NonDangerous, Agg Asslt Dangerous, Threat/Intimid Dangerous	Jury
July 25-30	Daphne Budge	Bradley Barwick	Gerst	Kennedy	CR-95-10262 1 Ct. Aggravated Assault		✓			**Not Guilty**	Jury

JULY, 1996
Jury & Bench Trials--Office of the Legal Defender

Dates: Start/Finish	Attorney	Invstgtr.	Judge	Prosecutor	CR# and Charge(s)	Class F/M	Dang.	Priors	On Prbtn./ Parole	Result (w/ hung jury, # of votes for not guilty / guilty)	Bench or Jury Trial
July 16 -29	Roland Steinle		Araneta	Ruiz	CR95-91564(a) Murder	F1				Guilty, Murder 2d degree	Jury
July 9 - 12	Christy Funckes		Arellano	Lynch	CR96-02964(a) Aggravated Robbery	F3			Parole	Hung Jury	Jury
July 8-9	Bruce Alldredge		Campbell	Liles	CR95-08494 Poss.Methamphetamine	F4			Prbtn	Guilty	Jury
July 24-30	Greg Parzych	E. Soto	Ishikawa	Martinez	CR95-92254 (b) 2 cts. Drive-By Shooting 2 cts. Misconduct Involving Weapons	F2 F3	✓			Guilty Guilty	Jury

Bulletin Board

◆ *New Attorneys:*

Lance Antonson has been with Community Legal Services in Phoenix from 1992 until recently, focusing on Urban Indian Law. Before then he was in private practice in Nebraska for several years. He graduated from the University of Nebraska College of Law. Lance will join Group C.

Hilary Berko has been in private practice since her admission to the Arizona Bar in 1995, and has handled some criminal matters. She went to law school in Florida. Hilary is fluent in Spanish. She has been assigned to Group D.

Frances Gray comes here from Virginia. Until her move, she was a public defender attorney for one and a half years in Fredericksburg, representing clients on felony, juvenile, and appellate matters. She graduated from George Washington University law school. Frances will join Group B.

Tim Mackey graduated from Pepperdine School of Law. He has been in private practice since his admission to the bar last year, chiefly handling civil matters. Tim will be added to Group C.

Margarita Silva is an ASU College of Law graduate. Since her admission to the bar in 1995 she has been in private practice with a civil and criminal caseload. She assisted at the Arizona Capital Representation Project while in law school and participated in a Federal District Court Externship. Margarita will be going to Group D.

Robert Stein was a criminal law practitioner in New York for a number of years before moving to Arizona in 1995. While in New York, he worked as an Assistant District Attorney, as a trial attorney in the Legal Aid (Public Defender) office, and as an Assistant Attorney General prosecuting fraud cases. He has been in private practice since his arrival in Arizona, handling social security disability cases. Bob has been assigned to Group C.

◆ *New Support Staff:*

Connie Boyer, the newest secretary in Trial Group D, started June 3. She graduated *summa cum laude* with a B.S.W. from ASU in 1995. Prior to coming to our office, Ms. Boyer did an internship with the AZ House of Representatives Human Services Committee.

Katherine Griswold started as the new office aide in Group A on July 30. Ms. Griswold moved to Phoenix from Prescott.

Raquel Murillo is the new records clerk. She started with our office July 22. Ms. Murillo previously worked for the Porter Sign Company.

Frank Robinson began employment as an investigator with our office August 19. Mr. Robinson has over eight years of experience as a private investigator with the firm of Meyer & Associates and has an extensive background in criminal investigations. He will be assigned to Trial Group A.

◆ *Moves/Changes:*

Vonda Wilkins, an attorney in Trial Group C, is leaving the office August 14 to move to Puerto Rico to study Spanish. Ms. Wilkins started with the office in the first group of law clerks in 1988.

Brenda Birkhimer, secretary to Dean Trebesch, is leaving the office August 14 after 17 years with the county.

Joan Lyons, a secretary in Appeals, left our office July 12 to go to a private firm.

Linda Lintz, a secretary in Trial Group D, is leaving the office August 22 to work at a private firm.

◆ *Miscellaneous*

Computer Corner will not appear in this or the September issue while new computers and accompanying programs are being installed. The column will resume with tips on our updated WordPerfect program after WordPerfect 6.1 is in use.

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